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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 567 F.2d 1095. The report of the Federal Communications Commission (Pet. App. 46a-77a) is reported at 48 F.C.C. 2d 1. The order of the Commission denying reconsideration (Pet. App. 78a-101a) is reported at 58 F.C.C. 2d 691.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977. The petition for a writ of certiorari was filed on February 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the First Amendment or the Communications Act of 1934 prohibits the Federal Communications Commission from determining that the fairness doctrine should not apply to standard product commercials unless they obviously and meaningfully discuss controversial issues of public importance.

STATEMENT

The fairness doctrine requires broadcast licensees (1) to cover controversial issues of public importance, and (2) to present differing viewpoints on those issues. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111. The Federal Communications Commission developed the doctrine under its authority to regulate broadcasting in the public interest, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 375-386, and first articulated its general principles in 1949. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246.

The Commission explicitly applied the fairness doctrine to standard product advertisements in 1967, ruling that ordinary cigarette commercials could

trigger an obligation to present viewpoints against smoking. *Television Station WCBS-TV*, 8 F.C.C. 2d 381, reconsideration denied, 9 F.C.C. 2d 921, affirmed *sub nom. Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842. Although the Commission had suggested that cigarette advertisements presented unique considerations (8 F.C.C. 2d at 381-382; 9 F.C.C. 2d at 942-943), the Court of Appeals for the District of Columbia Circuit later held that the principles expounded in *Television Station WCBS-TV* required the Commission to give reasoned consideration to fairness doctrine complaints respecting commercials for a department store during a strike by store employees. *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248, 256-259 (C.A.D.C.). The court subsequently held that the fairness doctrine was implicated by commercials for high-powered automobiles considered by many to be an environmental hazard. See *Friends of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (C.A.D.C.).

The Commission initiated a rule-making proceeding in 1971 to consider, among other things, whether there is "some workable standard for distinguishing various categories o[f] commercials, some of which would give rise to fairness or public interest duties and some of which would not?" *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Notice of Inquiry*, 30 F.C.C. 2d 26, 32. That

proceeding culminated in the Commission's *Fairness Report*, issued in June 1974. In the *Fairness Report* (Pet. App. 46a-77a) the Commission reversed its policy of applying the fairness doctrine to standard product commercials, concluding that ordinary product advertisements "make no meaningful contribution toward informing the public on any side of any issue" and that such advertisements therefore should not be found to fall within the scope of the fairness doctrine (Pet. App. 69a). That conclusion is at issue in this case.

The Commission flatly concluded in the *Fairness Report* that it had been a mistake to subject standard product advertising to the fairness doctrine in the first place. Reconsidering the question, the Commission stated its view that "application of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy" (Pet. App. 70a). The Commission also stated that adherence to its earlier decision would divert licensees' attention "from their public trustee responsibilities in aiding in the development of an informed public opinion" (Pet. App. 71a). As a result, the Commission concluded, the public interest would not be served by "stretch[ing] the fairness doctrine in an artificial way [to apply] it to commercials which play no meaningful or significant role in the debate of controversial issues" (Pet. App. 73a).

The Commission did not exclude all product commercials from the reach of the fairness doctrine. Rather the Commission distinguished between ordinary product commercials which seek only to sell a

product and "those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues" (Pet. App. 71a). The latter category of advertisements, like editorial advertising and institutional advertising that "obviously addresses, and advocates a point of view on, a controversial issue of public importance," will continue to give rise to fairness obligations (Pet. App. 68a).

On petition for review, the court of appeals upheld the Commission's determination.[1] The court held that the First Amendment does not require application of the fairness doctrine to all speech protected by the Amendment, remarking that "there is no right to broadcast a particular point of view simply because that point of view is protected by the first amendment" (Pet. App. 20a). The court found that, although the Commission perhaps misstated the extent to which commercial speech is protected by the First Amendment, that misstatement was not material to the ultimate conclusion regarding application of the fairness doctrine because the pertinent issue was not whether product commercials were protected by the First Amendment but whether ordinary product advertisements presented "'a meaningful discussion of a controversial issue of public importance'" (Pet. App. 22a, *quoting* Pet. App. 70a). Since the Com-

[1] The court, however, remanded the orders to the Commission for further consideration of certain access and other proposals that had been made to the Commission for implementation of the fairness doctrine in other contexts (Pet. App. 35a-42a, 45a).

mission could reasonably conclude that they did not, it was free to allow licensees to make their own judgments about the presentation of competing views.

The court of appeals also rejected (Pet. App. 23a-31a) arguments that the Commission was prohibited from modifying the product commercial policy by the public interest standard of the Communications Act and Congress' 1959 amendments to the Communications Act. 73 Stat. 557, 47 U.S.C. 315(a). The court noted that no clear policy on the applicability of the fairness doctrine to product commercials had existed in 1959 (Pet. App. 25a-26a);[2] that it had previously recognized the Commission's authority to modify the product commercial policy (Pet. App. 26a, n. 53);[3] and that it was reasonable for the Commission to conclude that the public interest in the efficient operation of the fairness doctrine would be better served by removing product commercials from the applicability of the doctrine (Pet. App. 27a-31a).

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[2] Although petitioner contended that a 1946 F.C.C. decision had established the applicability of the fairness doctrine to product commercials (Pet. App. 25a-26a), the court of appeals found that argument unpersuasive. See note 7, *infra*.

[3] *Friends of the Earth* v. *Federal Communications Commission, supra*, 449 F.2d at 1170. The court of appeals also pointed out this Court's statement in *Columbia Broadcasting System* v. *Democratic National Committee, supra*, 412 U.S. at 132, that the fairness inquiry was one step in "a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees" (Pet. App. 27a, n. 55).

ARGUMENT

The decision of the court of appeals, holding that the Commission need not apply the fairness doctrine to ordinary product commercials, is correct and fully consistent with prior decisions of this Court. It does not warrant further review.

1. Petitioner contends (Pet. 8-11) that the First Amendment requires the Commission to apply the fairness doctrine to standard product commercials. As the court of appeals noted (Pet. App. 19a), that argument is "based on a fundamental misunderstanding of the relationship between constitutional protection of commercial, or any other type of, speech and the functioning of the fairness doctrine."

The fact that particular forms of speech are entitled to protection from government interference under the First Amendment does not mean that they must be broadcast by unwilling stations. Indeed, given the broad categories of speech subject to constitutional protection and the relatively scarce resource of communications frequencies, that proposition would seem self-evident. "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102. As this

Court recognized in *Columbia Broadcasting*, *supra*, when it held that licensed stations need not extend time for paid editorial commercials, there is no necessary correspondence between the right to speak under the First Amendment and a right to speak through the broadcast media.

It is therefore not enough to suggest, as petitioner does, that the fairness doctrine must apply to ordinary product advertisements because they provide useful information to the public. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748; *Bigelow* v. *Virginia*, 421 U.S. 809. That fact, standing alone, gives no assured access to broadcast channels. Rather, the pertinent inquiry is whether the Commission's decision to exempt ordinary product commercials from the fairness doctrine so deprives the public of important ideas and information as to constitute an infringement of its right to be informed. That question, in turn, depends upon an assessment of the fairness doctrine itself and the purposes it serves.

"[U]nder the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 112. The *Fairness Report* does not denigrate that responsibility; to the contrary, the *Report* emphasizes that "[t]he purpose and foundation of the fairness doctrine is * * * that of the First Amendment itself: 'to preserve an un-

inhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee' [citation omitted]" (Pet. App. 51a). The Commission, therefore, continues to require that stations give adequate time for the discussion of public issues and a reasonable opportunity for opposing viewpoints to be heard (Pet. App. 53a-62a). Those obligations assure the public, at a minimum, of reasonable coverage of significant issues.

The fairness doctrine also applies to certain paid advertisements. Tracking the standard developed earlier for determining whether a program actually presents a position on a controversial issue (Pet. App. 58a), the Commission decided that the doctrine should apply to paid editorial commercials presenting "direct and substantial commentary on important public issues" (Pet. App. 67a) and to other commercials "devoted in an obvious and meaningful way to the discussion of public issues" (Pet. App. 71a). Absent "some meaningful or substantive discussion," however, the Commission found no reason to impose similar consequences on the broadcast of typical product commercials which, it concluded, cannot "realistically be said to inform the public on any side of a controversial issue of public importance" (*ibid.*).

Here, the Commission reasonably and properly concluded that the public is better served by focusing

the fairness doctrine on other targets. The standard product advertisement addresses controversial issues indirectly at best—indeed, if it addresses such issues obviously and meaningfully, it becomes subject to the fairness doctrine—and rebuttals directed singlemindedly at the underlying issue might well weight the balance of discussion heavily against the original advertiser (Pet. App. 70a).[4] Moreover, the involvement of broadcasters in the sensitive task of mediating disputes could "divert [their] attention * * * from their public trustee responsibilities in aiding the development of an informed public opinion" (Pet. App. 71a). To the extent that the Commission also would be required to determine the right to respond to ordinary commercials, the intrusion of government into the day-to-day operation of the broadcast media would be increased. It was, therefore, entirely reasonable for the Commission to conclude that any possible benefits to the public from application of the fairness doctrine to ordinary product advertisements would be outweighed by the serious inherent costs.

2. Petitioner, relying upon *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, also contends (Pet. 12) that the Commission's modification of the product commercial policy created a

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[4] Product advertisers could revamp their advertising, of course, to discuss underlying issues directly. But that course would simply compel commercial advertisements to be fields of public debate. The Commission could surely conclude that other forms for debate of public issues are more appropriate.

"gap in the administration of the fairness doctrine" and "extinguished the public's First Amendment right to receive contrasting views on issues relating to controversial products." We disagree.

The Commission has not exempted all consumer information from the fairness doctrine, but only standard product commercials that contain no obvious and meaningful discussion of public issues. "Under the general fairness doctrine, broadcasters—as trustees for their communities—are required to make a positive effort to implement a meaningful discussion of major public issues and in practical effect consumer issues will receive a significant amount of coverage" (Pet. App. 73a). Consumer information is regularly presented in public service announcements, newscasts and a variety of discussion and information programming. In addition, broadcasters are free to treat product commercials as though subject to the fairness doctrine if they believe it appropriate.[5]

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[5] The state statute in *Virginia State Board of Pharmacy, supra,* flatly prohibited the dissemination of certain product information. The Commission's action here involves no such ban. Broadcast stations are free to present "views on issues relating to controversial products" (Pet. 12) to whatever extent and in whatever format they desire. Moreover, as a result of the partial remand of the decision below (see n. 1, *supra*), the Commission recently has begun a new proceeding to consider alternatives for achieving compliance with the goals of the fairness doctrine, including "a right of access" policy. See *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Notice of Inquiry,* BC Docket No. 78-60, FCC 78-108, released March 2, 1978, 43 Fed. Reg. 9201.

The Commission, in striking a balance among competing interests, has concluded that the public would be better informed about important issues associated with the use of products and services if "the decision to cover these and other matters of similar public concern" is made by each individual licensee "in the fulfillment of * * * [its] public trustee responsibilities," and not by a "tortured or distorted application of fairness doctrine principles" to such announcements (Pet. App. 72a). That approach is entirely consistent with *Columbia Broadcasting System*, *supra*. There, the Court stated that the "paramount" interests of the public are best served if broadcasters, not advertisers, determine the agenda for discussion of public issues, noting that a system in which licensees could not control the agenda for discussion would result in an "erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees * * * to private individuals * * *." 412 U.S. at 124. *A fortiori*, there is no requirement that the agenda for public discussion be set by the perceived implications of ordinary product advertising. See also Pet. App. 30a.

3. Petitioner also argues (Pet. 14-16) that a 1959 amendment to Section 315 of the Communications Act prohibited the Commission from modifying the product commercial policy. The court of appeals correctly rejected this contention (Pet. App. 23a-31a).

Congress could not have ratified or frozen into existence a Commission policy concerning advertise-

ments in 1959 because no articulated policy existed until the cigarette commercial decision in 1967.[6] Furthermore, this Court held in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, that while Congress in amending Section 315(a) had approved the general tenets of the fairness doctrine, it had left questions of applications and accommodation to the Commission. 395 U.S. at 380-386.[7] As the First Circuit has recognized in rejecting an identical argument, *Public Interest Research Group* v. *Federal Communications Commission*, 522 F.2d 1060, 1066-1067, certiorari denied, 424 U.S. 965, nothing in the amended Section 315(a) or in its legislative history suggests that Congress wished so to limit the

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[6] Petitioner errs in relying on *dictum* in *Sam Morris*, 11 F.C.C. 197 (1946), as the origin of the application of the fairness doctrine to commercials (Pet. 14-15). The fairness doctrine itself was not articulated until 1949, three years after the *Sam Morris* decision, although the obligation to cover public issues fairly had always existed under the public interest standard. *Report on Editorializing, supra.* Moreover, the *dictum* was not followed once during the 13 years between its issuance and the 1959 amendments to Section 315. The court of appeals properly rejected petitioner's interpretation of the *Sam Morris* ruling in the decision below (Pet. App. 25a-26a) just as it declined to place such reliance on *Sam Morris* in the *Banzhaf* decision in 1968. See *Banzhaf* v. *Federal Communications Commission, supra*, 405 F.2d at 1092.

[7] See also *Columbia Broadcasting System* v. *Democratic National Committee, supra*, 412 U.S. at 122, where this Court stated that Congress had given the Commission the flexibility to experiment in the fairness area "with new ideas as changing conditions require."

Commission's discretion to adapt its policies to the changing needs of its licensees and the general public.[8]

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[8] Although petitioner argues that the decision below is inconsistent with earlier cases from the Court of Appeals for the District of Columbia Circuit, that contention, to the extent relevant at all, is incorrect. In *Banzhaf* v. *Federal Communications Commission, supra*, the court gave "cautious approval" to the cigarette commercial ruling, but did not hold that the Commission was required to apply the fairness doctrine. 405 F.2d at 1099. While the court did state that the cigarette ruling was "required by the public interest" (Pet. 15), the court was merely using the Commission's own words. The Commission, of course, has rejected that conclusion. Moreover, the court of appeals in the decision below repudiated the language as "stronger * * * than was necessary * * *" (Pet. App. 26a).

In *Friends of the Earth* v. *Federal Communications Commission, supra*, the court merely required that the Commission follow its cigarette commercial precedent. Noting the Commission's pending fairness study, however, the court stated:

> *Pending* * * * *a reformulation of its position*, we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170 (emphasis added). In *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248, the court remanded for further proceedings a Commission grant of license renewal without hearing, determining, *inter alia*, that in light of *Banzhaf* and of national labor policy, the Commission had not given adequate analysis to fairness doctrine complaints based on department store commercials aired during a strike of store employees. *Id.* at 256-259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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